

## St. John's Law Review

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Volume 59  
Number 3 *Volume 59, Spring 1985, Number 3*

Article 6

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June 2012

### McCray v. Abrams: An End to Abuse of the Peremptory Challenge?

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#### Recommended Citation

Norton, Ralph W. (1985) "McCray v. Abrams: An End to Abuse of the Peremptory Challenge?," *St. John's Law Review*. Vol. 59 : No. 3 , Article 6.

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## **McCRAy v. ABRAMS: AN END TO ABUSE OF THE PEREMPTORY CHALLENGE?**

The sixth amendment of the United States Constitution mandates that a criminal defendant be tried by an impartial jury.<sup>1</sup> To ensure this result, most states have devised a system whereby both the prosecution and the defense counsel may, during the voir dire,<sup>2</sup> challenge the selection of potential jurors if it can be shown that such jurors harbor biases that may prevent them from deciding the case impartially.<sup>3</sup> However, because counsel may detect certain bi-

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<sup>1</sup> U.S. CONST. amend. VI. The sixth amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." *Id.*

<sup>2</sup> See M. BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES: THE LAW OF PUBLIC ORDER 487 (1969). During the stage of jury selection known as the voir dire, prospective jurors are examined, collectively or individually, by the parties or by the court. *Id.* The goal of voir dire is the discovery of bias. See, e.g., *People v. Boulware*, 29 N.Y.2d 135, 139, 272 N.E.2d 538, 540, 324 N.Y.S.2d 30, 32 (1971) (voir dire necessary so challenges may be intelligently used to remove biased jurors), *cert. denied*, 405 U.S. 995 (1972); cf. *State v. Brown*, 240 S.C. 357, 365-66, 126 S.E.2d 1, 5 (1962) (voir dire examination guaranty of right to impartial jury; failure to allow voir dire constitutes reversible error).

Not every jurisdiction gives the parties an absolute right to examine the potential jurors, who are also known as veniremen. See M. BASSIOUNI, *supra*, at 487 (depending on state law, voir dire may be conducted by parties or court). In federal court, examination may be conducted by the parties or the court itself, according to the court's discretion. FED. R. CRIM. P. 24(a); see, e.g., *United States v. Rankin*, 572 F.2d 503, 505 (5th Cir.) (per curiam) (trial judge has discretion to conduct voir dire without allowing counsel to question veniremen), *cert. denied*, 439 U.S. 979 (1978); see also *United States v. Shavers*, 615 F.2d 266, 268 (5th Cir. 1980) (discretion under federal rule includes discretion not to submit questions suggested by counsel to jury). Approximately 10 states follow the federal rule, 10 restrict examination to the trial judge, 22 allow both judge and counsel to question veniremen, and the rest allow only counsel to conduct the examination. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO TRIAL BY JURY 63 (Tent. Draft 1968) [hereinafter cited as STANDARDS RELATING TO TRIAL BY JURY]; see, e.g., *People v. Crowe*, 8 Cal. 3d 815, 824, 506 P.2d 193, 197, 106 Cal. Rptr. 369, 373 (1973) (en banc) (court will uphold any method of voir dire that results in reasonable examination); *Commonwealth v. Kiernan*, 348 Mass. 29, 201 N.E.2d 504, 508 (1964) (parties need not be permitted to interview jurors), *cert. denied*, 380 U.S. 913 (1965); *People v. Goode*, 78 Mich. App. 781, 783-84, 261 N.W.2d 47, 48 (1977) (trial judge has discretion to conduct voir dire himself).

<sup>3</sup> *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 302, 67 S.E.2d 292, 298 (1951); see, e.g., N.Y. CRIM. PROC. LAW § 270.15(2) (McKinney 1982) (statute permits challenge for cause). Challenge for cause requires a designated reason. *Ponder*, 234 N.C. at 302, 67 S.E.2d at 298; see also *Freeman v. People*, 4 Denio 2, 31 (N.Y. 1847) (challenge for cause must specify grounds of challenge, otherwise it will not be considered by court).

ases that are not actually demonstrable, state criminal procedures often allot to each side a certain number of peremptory challenges that traditionally have been used to remove persons from the venire without cause or explanation.<sup>4</sup> The use of such challenges by prosecutors has been perceived as a means of eliminating minority groups from the venire and has been attacked as a violation of a criminal defendant's sixth amendment implied right to a fair trial by a representative cross-section of the community.<sup>5</sup> Although the

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Most states have set forth specific grounds upon which challenge for cause may be granted. See AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO TRIAL BY JURY 68 (Approved Draft 1968). These grounds generally include factors such as actual bias, lack of qualification to sit as a juror, lack of sound mind, prior service as a juror, blood relation to defendant, or status as a party adverse to defendant in a civil action. See 3 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE §§ 447-461 (12th ed. 1975); see also N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1982) (grounds for challenge for cause). Once a challenge for cause is allowed, the prospective juror must be excluded from service. N.Y. CRIM. PROC. LAW § 270.20(2) (McKinney 1982); cf. M. BASSIOUNI, *supra* note 2, at 487 ("[f]ailure of the court to discharge a juror challenged for adequate cause will be grounds for mistrial"). Both sides may challenge an unlimited number of jurors for cause, subject to the court's recognition that such cause exists. See J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 140 (1977); Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 340 (1982); see also Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177, 1179 (1980) (no limit to challenge for cause).

<sup>4</sup> *E.g.*, *Swain v. Alabama*, 380 U.S. 202, 220 (1965); M. BASSIOUNI, *supra* note 2, at 487; J. VAN DYKE, *supra* note 3, at 139; see, *e.g.*, *Hill v. State*, 275 Ark. 71, 83, 628 S.W.2d 284, 290 (explanation unnecessary when veniremen stricken peremptorily), *cert. denied*, 459 U.S. 882 (1982); *People v. Roxborough*, 307 Mich. 575, 593, 12 N.W.2d 466, 473 (1943) (prosecutor's reasons for peremptory challenge immaterial), *cert. denied*, 323 U.S. 749 (1944); see also N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982) (no reason need be assigned for peremptory challenge).

By its nature, the peremptory challenge is used "without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U.S. at 220. It is "an arbitrary and capricious species of challenge . . . [used] . . . without showing any cause at all . . ." 4 W. BLACKSTONE, COMMENTARIES 353. It is especially useful when an attorney suspects that a potential juror is being biased but cannot prove it. See J. VAN DYKE, *supra* note 3, at 146.

<sup>5</sup> See Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1724 (1977). See generally J. VAN DYKE, *supra* note 3, at 145-69 (discussing impact of *Swain* on peremptory challenges). In 1965, the United States Supreme Court addressed the matter of the unrestricted peremptory challenge. See *Swain v. Alabama*, 380 U.S. 202 (1965). In *Swain*, an all-white jury convicted a black man for the rape of a white woman. *Id.* at 203. The prosecutor had used peremptory challenges to exclude six black veniremen. See *id.* at 205. The Court upheld the constitutionality of the Alabama prosecutor's challenges, declaring that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated . . ." *Id.* at 220. Four justices speculated, however, that if the prosecutor had systematically, in case after case, excluded all black jurors through peremptory challenges, the defendant might have prima facie proof of a con-

federal courts have almost uniformly upheld the indiscriminate use of peremptory challenges absent a showing of "systematic exclusion" of minorities from the venire,<sup>6</sup> several state courts have begun to interpret their state constitutions as affording greater protection to the criminal defendant in this area.<sup>7</sup>

stitutional violation. See *id.* at 223-24 (dictum); *id.* at 228 (Harlan, J., concurring). A dissent by Justice Goldberg suggested that once the defendant had presented a prima facie case of systematic exclusion, the burden should shift to the state to prove that the incident was an isolated one. *Id.* at 245 (Goldberg, J., dissenting). Commentators have criticized *Swain* for imposing too harsh a burden of proof on the defendant. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 10-11 (1982); see, e.g., Note, *The Case for Black Juries*, 79 YALE L.J. 531, 540 (1970) (*Swain* standard implies Court would "wink an eye" at discriminatory challenges) [hereinafter cited as *The Case for Black Juries*]; Comment, *Swain v. Alabama: A Constitutional Blueprint for Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1160 (1966) (*Swain* sanctions use of procedural device to perpetuate control of southern judicial machinery by white majority). In fact, few defendants have been able to meet the burden in subsequent state or federal trials. See, e.g., *United States v. Carter*, 528 F.2d 844, 848 (8th Cir. 1975) (defendant's argument rejected despite statistical proof that high percentage of blacks challenged in fifteen cases), *cert. denied*, 425 U.S. 961 (1976); *United States v. Danzey*, 476 F. Supp. 1065, 1066-67 (E.D.N.Y. 1979) (systematic exclusion requires proof of pattern extending over series of cases; prosecutor's statement that he "make[s] it a practice" to exclude jurors of defendants' ethnic background insufficient), *aff'd*, 620 F.2d 286 (2d Cir.), *cert. denied*, 449 U.S. 878 (1980); *Rogers v. State*, 257 Ark. 144, 148, 515 S.W.2d 79, 83 (1974) (examination of voir dire transcript revealed other possible reasons for challenges), *cert. denied*, 421 U.S. 930 (1975); *State v. Booker*, 517 S.W.2d 937, 939-41 (Mo. Ct. App. 1974) (statistical evidence insufficient); see also Note, *supra*, at 1723 n.36 (no violations found in federal courts after *Swain*).

The use of peremptory challenges in state courts has been blamed for the exclusion of blacks from southern juries. See J. VAN DYKE, *supra* note 3, at 150; Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 283 (1968) (peremptory challenge used to bar blacks who manage to get past other discriminatory jury-selection procedures); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U.L.J. 662, 665-66 (1974) (peremptory challenge allows majority whites to exclude minority blacks from jury service) [hereinafter cited as *Case Study*].

<sup>6</sup> See, e.g., *United States v. Delay*, 500 F.2d 1360, 1366 (8th Cir. 1974) (government has no burden of showing lack of systematic exclusion in case at hand); *United States v. Ming*, 466 F.2d 1000, 1006 (7th Cir.) (absent proof of systematic exclusion, peremptory challenge of only two black veniremen did not deny defendant due process), *cert. denied*, 409 U.S. 915 (1972); *United States v. Carlton*, 456 F.2d 207, 208 (5th Cir. 1972) (prosecutor's subjective reasons for use of peremptory challenge within one case are beyond inquiry). But see *McCray v. Abrams*, 750 F.2d 1113, 1131 (2d. Cir. 1984) (prosecutor's discriminatory use of peremptory challenge within one case violation of sixth amendment and can be blocked by defendant).

<sup>7</sup> Saltzburg & Powers, *supra* note 3, at 337-38; see, e.g., *People v. Wheeler*, 22 Cal. 3d 258, 277, 583 P.2d 748, 763, 148 Cal. Rptr. 890, 903 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979). In *Wheeler*, two black men accused of murdering a white were convicted by an all-white jury after the California prosecutor peremptorily challenged every black on the venire. See *Wheeler*, 22 Cal. 3d at 262-63, 583 P.2d at 752, 148 Cal. Rptr. at 893. The court distinguished "case-specific bias" and

Recently, in *McCray v. Abrams*,<sup>8</sup> the Court of Appeals for the Second Circuit concluded that under the federal constitution a criminal defendant may block the unbridled use of peremptory challenges by the prosecution if it can be shown that such challenges have been used in a specific case for the purpose of eliminating racial minorities from the jury.<sup>9</sup>

In *McCray*, a white art student was assaulted and robbed by three black men in Brooklyn, New York.<sup>10</sup> The defendant, Michael McCray, originally was tried in a New York state court by a jury composed of nine whites and three blacks.<sup>11</sup> The trial ended in a hung jury, which allegedly split along racial lines.<sup>12</sup> At the second

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"group bias," holding that although peremptory challenges could properly be used to eliminate biases that related specifically to the defendant being tried, the elimination of "the diverse beliefs and values the jurors bring from their group experiences" constituted a violation of the California constitution, which guaranteed a party's right to an impartial jury. See *id.* at 274-78, 583 P.2d at 760-62, 148 Cal. Rptr. at 901-03; CAL. CONST. art. I, § 16. In *Soares*, three black men were charged with the murder of a white Harvard University student during a racially motivated incident. See 377 Mass. at 462-63, 465-70, 387 N.E.2d at 502, 504-06. During the voir dire, the prosecutor peremptorily challenged twelve black jurors. *Id.* at 473, 387 N.E.2d at 508. Although the prosecutor had not exhausted his peremptory challenges, one black man was seated on the petit jury as foreman. *Id.* Following the reasoning of *Wheeler*, the Supreme Judicial Court of Massachusetts held that the Massachusetts constitution barred the use of peremptories to exclude veniremen "solely by virtue of their membership in, or affiliation with, particular defined groupings in the community." *Id.* at 486, 387 N.E.2d at 515. But see *People v. Payne*, 99 Ill. 2d 135, 138-39, 457 N.E.2d 1202, 1204 (1983) (peremptory challenge of prospective black jurors allowed provided there is no systematic exclusion of blacks), *cert. denied*, 105 S. Ct. 447 (1985); *People v. McCray*, 57 N.Y.2d 542, 548-50, 443 N.E.2d 915, 918-19, 457 N.Y.S.2d 441, 445 (1982) (prosecutor's motives for striking jurors not subject to scrutiny based upon assertions by defense that peremptory challenges are being used to exclude minorities), *cert. denied*, 461 U.S. 961 (1983). One New York appellate court attempted to use the reasoning of the California and Massachusetts courts. See *People v. Thompson*, 79 App. Div. 2d 87, 435 N.Y.S.2d 739 (2d Dep't 1981). In *Thompson*, the Appellate Division held that the New York constitution barred the use of peremptory challenges based on race. See *id.* at 106, 435 N.Y.S.2d at 752; N.Y. CONST. art. I, § 1. However, *Thompson* appears to have been overruled *sub silentio* by *People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983); see *infra* note 15 and accompanying text.

<sup>8</sup> 750 F.2d 1113 (2d Cir. 1984).

<sup>9</sup> *Id.* at 1115.

<sup>10</sup> *Id.* In *McCray*, a student at Pratt Institute had just withdrawn cash from an automatic bank teller machine when his assailants pushed him into a doorway and took the cash at gunpoint. *People v. McCray*, 57 N.Y.2d 542, 544, 443 N.E.2d 915, 916, 457 N.Y.S.2d 441, 442 (1982), *cert. denied*, 461 U.S. 961 (1983), *later proceeding*, *McCray v. Abrams*, 576 F. Supp. 1244 (E.D.N.Y. 1983).

<sup>11</sup> See 750 F.2d at 1115.

<sup>12</sup> *Id.* at 1115-18. Defense counsel at the second McCray trial alleged that the three acquitting votes at the first trial were cast by the three black jurors. *Id.* at 1116. However, the prosecutor, who had represented the state in both trials, insisted that one of the votes

trial, the prosecutor used eight of her eleven peremptory challenges to remove seven blacks and one hispanic from the jury.<sup>13</sup> Subsequently, McCray was convicted before an all-white jury.<sup>14</sup> McCray's conviction was twice affirmed on appeal,<sup>15</sup> and his petition for certiorari was denied by the United States Supreme Court.<sup>16</sup> However, the Federal District Court granted habeas corpus relief, reversing the defendant's conviction on the ground that "the sixth amendment prohibit[ed] the prosecution's use of challenges to discriminate on the basis of race."<sup>17</sup> On appeal, a Second Circuit panel agreed that McCray had made a *prima facie* showing that the prosecutorial challenges were discriminatory, but remanded the case to afford the state an opportunity to rebut that showing.<sup>18</sup>

Writing for the majority, Judge Kearse determined that the sixth amendment barred the states from denying a defendant the possibility of a jury that represented a "fair cross-section of the community."<sup>19</sup> The majority recognized that when there is a con-

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was cast by a white juror. *Id.* at 1118.

<sup>13</sup> *Id.* at 1116.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1115-16. The Appellate Division affirmed without opinion, see *People v. McCray*, 84 App. Div. 2d 769, 444 N.Y.S.2d 972 (2d Dep't 1981), *aff'd*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441, *cert. denied*, 461 U.S. 961 (1983), *later proceeding*, *McCray v. Abrams*, 576 F. Supp. 1244 (E.D.N.Y. 1983). The New York Court of Appeals affirmed McCray's conviction by a 4 to 3 vote, relying on *Swain v. Alabama*, 380 U.S. 202 (1965). See 57 N.Y.2d 542, 544-50, 443 N.E.2d 915, 916-19, 457 N.Y.S.2d 441, 442-45; see generally *supra* note 5.

<sup>16</sup> See *McCray v. New York*, 461 U.S. 961 (1983). The denial of certiorari was accompanied by two opinions in which a total of five justices indicated that the Court may soon grant certiorari to a case of this type. *Id.* at 961-70. In fact, the Court subsequently granted certiorari to a case from the Supreme Court of Kentucky. See *Batson v. Kentucky*, 105 S.Ct. 2111 (1985).

<sup>17</sup> See *McCray v. Abrams*, 576 F. Supp. 1244, 1249 (E.D.N.Y. 1983). Influenced by the Supreme Court, *id.* at 1246; see *supra* note 16, Judge Nickerson ruled that the sixth amendment required judicial scrutiny of peremptory challenges that appeared to have been used discriminatorily. *McCray*, 576 F. Supp. at 1249. Judge Nickerson's reasoning closely followed that of the California and Massachusetts courts in *Wheeler* and *Soares*. See *supra* note 7.

<sup>18</sup> *McCray*, 750 F.2d at 1118, 1134-35. On appeal, the state conceded that the use of peremptory challenges to eliminate potential jurors on the basis of race was unconstitutional. *Id.* at 1118. The state argued merely that McCray had not established a *prima facie* case of such a violation, and that it should have been granted a hearing to rebut his allegation. *Id.* The Second Circuit adopted much of the reasoning of the district court, but agreed that the state should have been given another opportunity to prove that its challenges were not used unconstitutionally. *Id.*

<sup>19</sup> *Id.* at 1129. The *McCray* court distinguished *Swain v. Alabama*, 380 U.S. 202 (1965), on the ground that *Swain* was decided under the Equal Protection Clause of the fourteenth

flict between the statutory right to use peremptory challenges and a constitutional right, the latter must be supreme.<sup>20</sup> The majority held that the defendant could make out a prima facie case of unconstitutionality by showing that the persons excluded belonged to a distinctive group in the community, and that it was substantially likely that their membership in the group was the sole reason for exclusion by the prosecutor.<sup>21</sup> The court concluded that once such a prima facie case is established, the state must give reasons for its peremptory challenges.<sup>22</sup> Judge Kearse explained that such reasons could be something less than "cause," and that any genuine purpose for exclusion other than group-based affiliation would suffice to rebut defendant's prima facie showing.<sup>23</sup>

Dissenting, Judge Meskill argued that the majority's attempt to create a middle ground between the traditional peremptory challenge and a challenge for cause was unworkable.<sup>24</sup> The dissent maintained that compelling the prosecution to provide a nonracial motivation for its peremptory challenges would undermine the use-

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amendment, U.S. CONST. amend. XIV, § 1. See *McCray*, 750 F.2d at 1118-19, 1123-24. Since *Swain*, noted the court, the impartial jury guarantee has been held to apply to the states through the Due Process Clause of the fourteenth amendment. See *id.* at 1124; see also *infra* notes 42 & 43 and accompanying text.

<sup>20</sup> *McCray*, 750 F.2d at 1130.

<sup>21</sup> *Id.* at 1131-32. The *McCray* court adopted part of the test developed in *Duren v. Missouri*, 439 U.S. 357 (1979), for a prima facie case of unconstitutional discrimination in the formation of the venire. See *Duren*, 439 U.S. at 364. *Duren* requires that the defendant show that the persons excluded formed a cognizable group, that the representation of this group on the venire was not reasonably proportional to their number within the community, and that this underrepresentation was due to systematic exclusion by the state. See *id.* The Second Circuit held that the second requirement — proportional representation — did not apply to the petit jury stage. *McCray*, 752 F.2d at 1129, 1131. However, the first and third requirements, asserted the court, could function to ensure the defendant the ability to challenge any attempt by the prosecutor to systematically deny the defendant the possibility of a cross-sectional jury. *Id.* at 1131-32.

<sup>22</sup> 750 F.2d at 1132. The defendant's prima facie case, said Judge Kearse, consisted of two parts. The defendant must establish that the group allegedly excluded by the prosecutor is a "cognizable group" within the community and he must show that there was a "substantial likelihood" that the challenges were used to exclude the potential jurors because of their membership in the group, and not for any suspicion of bias. See *id.* at 1131-32.

<sup>23</sup> *Id.* at 1132. The court stated that the prosecutor need give only genuine reasons other than group affiliation for the challenges. *Id.*

<sup>24</sup> *Id.* at 1135 (Meskill, J., dissenting). The *McCray* dissent asserted that the decision was contrary to precedent in almost every other circuit and in the Second Circuit itself. *Id.* at 1136 (Meskill, J., dissenting). Judge Meskill criticized the majority's departure from *Swain*, and argued that Supreme Court decisions regarding the sixth amendment did not demonstrate such a departure. *Id.* at 1136-37 (Meskill, J., dissenting).

fulness of such challenges in securing an impartial jury.<sup>25</sup> The dissenting judge predicted that the adoption of the majority's solution would eventually lead to conferral of a similar right on the prosecution, with the result that criminal defendants would ultimately enjoy less safeguards than they did prior to *McCray*.<sup>26</sup>

Although the *McCray* court has incorporated sixth amendment principles into the latter stages of the jury selection process, it is submitted that the court has failed to consider the practical difficulties of imposing its suggested procedures on the present peremptory challenge system. This Comment will analyze the recent development of the defendant's right to prevent the prosecutor from abusing the peremptory challenge, and the *McCray* court's impact on this development. After examining current proposals for changing the challenge system, this Comment will propose a solution that preserves the defendant's sixth amendment rights and maintains the integrity of the peremptory challenge.

#### CHALLENGING THE PEREMPTORY CHALLENGE

The *McCray* court recognized that peremptory challenges, in theory, should enable the parties to create a jury that is free from non-demonstrable, case-specific biases.<sup>27</sup> Indeed, when each side has an equal number of challenges, each side ideally has the same ability to eliminate jurors that, for whatever reason, appear likely to favor the opposition.<sup>28</sup> In reality, however, the prosecutor often

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<sup>25</sup> *Id.* at 1137-38 (Meskill, J., dissenting).

<sup>26</sup> *Id.* at 1138-39 (Meskill, J., dissenting).

<sup>27</sup> *Id.* at 1119; *see also* *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (function of challenge is to eliminate bias and ensure verdict based on evidence). The challenge should allow parties to "eliminate extremes of partiality on both sides." *Swain*, 380 U.S. at 219. Challenge for cause is usually too narrow to remove all jurors suspected of bias; the peremptory challenge is used to eliminate those for whom cause cannot be shown. Saltzburg & Powers, *supra* note 3, at 340.

<sup>28</sup> *See* *Swain v. Alabama*, 380 U.S. 202, 220 (1965). The system should secure freedom from bias for both prosecution and defense. *Id.* Most states give both sides the same number of challenges. STANDARDS RELATING TO TRIAL BY JURY, *supra* note 2, at 75; *see also* N.Y. CRIM. PROC. LAW § 270.25(2) (McKinney 1982) (each side given same specified number of challenges, which number depends on severity of crime).

Peremptory challenges are generally used to eliminate those veniremen suspected of leaning toward a verdict for the other party. *See, e.g., United States v. Newman*, 549 F.2d 240, 249 (2d Cir. 1977) (prosecutor struck jurors because he believed doing so would lessen risk of bias in favor of accused); *see also* J. VAN DYKE, *supra* note 3, at 146 (jurors suspected of being unfavorably disposed toward a party due to group affiliation can be challenged peremptorily).



has an inherent numerical advantage over a minority defendant.<sup>29</sup> Given a venire that is a representative cross-section of the community,<sup>30</sup> the prosecutor has little difficulty eliminating all minority members from the jury.<sup>31</sup>

The Supreme Court addressed this imbalance in *Swain v. Alabama*,<sup>32</sup> which involved racially discriminatory use of peremptory challenges by a local prosecutor.<sup>33</sup> The Supreme Court held that there is a presumption in any given case that the prosecutor is using his or her peremptory challenges to obtain an impartial jury.<sup>34</sup> A defendant could only establish a claim of unconstitutionality if it could be shown that the state had systematically excluded every member of a distinctive group from the petit jury over a period of time.<sup>35</sup>

*Swain* was decided on equal protection grounds.<sup>36</sup> The focus of the Court's concern was on the right of cognizable groups to participate in the judicial process, not on the right of the individual defendant to a jury from which no distinctive group had been excluded.<sup>37</sup> Thus, a defendant was required to show that the discrim-

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<sup>29</sup> See J. VAN DYKE, *supra* note 3, at 154. If each side has a number of challenges greater than the number of minorities on the venire, it is possible for the prosecutor to eliminate the minorities. *Id.* In the southern states, the numerical problem is readily apparent as the number of whites on the venire is generally larger than the defendant's number of challenges. See *Case Study*, *supra* note 5, at 666.

<sup>30</sup> See, e.g., N.Y. JUD. LAW § 500 (McKinney Supp. 1984) (all litigants entitled to venire selected from cross-section of community).

<sup>31</sup> See *supra* note 29.

<sup>32</sup> 380 U.S. 202 (1965).

<sup>33</sup> *Id.* at 210-11.

<sup>34</sup> *Id.* at 222. The Court held that any inquiry into the motives behind a prosecutor's use of peremptories within a single case would change the essential nature of the challenge. *Id.* at 221-22. Exercised without judicial control, the peremptory challenge allowed both parties to challenge jurors "in light of the limited knowledge counsel has of them." *Id.* at 221. This freedom, the Court held, gave parties the ability to excuse jurors for any "real or imagined partiality." *Id.* at 220.

<sup>35</sup> *Id.* at 223-24. The Court declared that if the state did not leave a single black venireman on any jury in any criminal case, "it [might] appear that the purposes of the peremptory challenge [were] being perverted." *Id.* However, the Court made it clear that such a "perversion" would occur only when blacks were excluded for purposes "wholly unrelated" to the specific trial, so that the result would be a denial of the rights of blacks as a group to participate in the judicial process. *Id.* at 224.

<sup>36</sup> *Id.* at 206, 221.

<sup>37</sup> *Id.* at 224. The Court was concerned that the states not be allowed to "deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.* This situation, said the Court, would "raise[] a different issue" from that of the prosecution's use of peremptory challenges within the defendant's trial. *Id.* at 223.

inatory use of peremptory challenges was so uniform that it created an inference that, through unequal application, the peremptory challenge statute itself constituted a denial of equal protection.<sup>38</sup> Consequently, after *Swain*, it was only in exceptional cases that a defendant was able to defeat the prosecutor's challenges.<sup>39</sup>

*Swain* has been criticized for its failure to provide the defendant with a weapon against discriminatory prosecutorial challenges.<sup>40</sup> It has become clear that something more is required to protect the defendant from prosecutorial "perversion" of the challenge process.<sup>41</sup>

In the years since *Swain* was decided, the Supreme Court has extended the sixth amendment's guarantee of trial by impartial jury to state criminal trials,<sup>42</sup> and has applied the guarantee to a

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<sup>38</sup> See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 587 (2d ed. 1983). Equal protection analysis centers on state-sponsored, legislative actions. *Id.* When a statute, such as a peremptory challenge statute, is non-discriminatory on its face, a defendant must show that it is being applied in a discriminatory manner. *Id.* at 600. The defendant is required to prove that the persons charged with administration of the law are employing a suspect form of classification, with the result that for practical purposes, the classification is established within the law. *Id.* at 601; see, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (municipal ordinance regulating operation of public laundries, applied solely to Chinese launderers, held violation of equal protection).

<sup>39</sup> See, e.g., *State v. Washington*, 375 So. 2d 1162, 1163 (La. 1979); *Brown v. State*, 371 So. 2d 751, 754 (La. 1979). In *Washington*, although one black was seated after the prosecutor ran out of peremptory challenges, the court reversed the defendant's conviction on the basis of uncontradicted testimony by three defense attorneys that, in their experience, the prosecutor challenged jurors on a discriminatory basis. 375 So. 2d at 1163.

In *Brown*, the defendant succeeded in challenging the prosecutor's peremptories by introducing the testimony of two defense attorneys and judicial records of the composition of other juries within the parish where the trial was held. 371 So. 2d at 752-53.

It is submitted that the ability of a defendant to meet the *Swain* test depends more upon the attitude of the court than the strength of the evidence of discrimination. Indeed, the defense in *Swain* presented evidence at least as strong as that produced in *Washington* and *Brown*. See *Swain*, 380 U.S. at 231-32 (Goldberg, J., dissenting) ("no Negro within the memory of persons now living has ever served on any petit jury in any civil or criminal case tried in Talladega County . . .").

<sup>40</sup> See, e.g., J. VAN DYKE, *supra* note 3, at 151, 156. (*Swain* test virtually impossible to prove); Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770, 1770-71 (1979) (prosecutors' challenges against minorities immune from equal protection scrutiny); *The Case for Black Juries*, *supra* note 5, at 540 (*Swain* approach deficient because most cases brought to defend interest of individual defendant, not group excluded); *Case Study*, *supra* note 5, at 666 (Court preferred procedural device over constitutional right).

<sup>41</sup> See *supra* note 39.

<sup>42</sup> See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

range of state jury selection procedures.<sup>43</sup> The concept has developed through a series of sixth amendment cases that juries should reflect a "cross-section of the community," so that an adequate hedge is provided against abuse of authority by prosecutors, judges, or specific "privileged" groups within the community.<sup>44</sup> Until *McCray*, however, the cross-section requirement had been applied only to state statutes regulating the process of selecting the venire.<sup>45</sup> In *McCray*, the Court of Appeals for the Second Circuit extended existing sixth amendment analysis to the petit jury.<sup>46</sup> The court reasoned that the effort to prevent states from excluding persons from the venire on the basis of group affiliation is important only because the defendant has a right to a petit jury that is as near an approximation to a cross-section of the community as possible.<sup>47</sup> Therefore, the defendant had standing to question the prosecutor's peremptory challenges whenever it appeared that they were being used to exclude members of a particular group within the context of his own case.<sup>48</sup>

It is submitted that the *McCray* court's extension of the sixth amendment right to an impartial jury to the peremptory challenge process, although a logical extension of sixth amendment prece-

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<sup>43</sup> See, e.g., *Duren v. Missouri*, 439 U.S. 357, 367 (1979) (exemption of women on request constituted systematic exclusion, violating cross-sectional requirement); *Ballew v. Georgia*, 435 U.S. 223, 236-37 (1978) (jury of five too small to provide adequate cross-section); *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975) (inclusion of women only on request violation of requirement); *Apodaca v. Oregon*, 406 U.S. 404, 411-12 (1972) (unanimous verdict not required by sixth amendment); *Williams v. Florida*, 399 U.S. 78, 102-03 (1970) (juries of less than twelve permissible).

<sup>44</sup> See, e.g., *Ballew v. Georgia*, 435 U.S. 223, 232-233 (1978) (White, J., dissenting); *Williams v. Florida*, 399 U.S. 78, 100 (1970). The *Williams* court held that the jury must represent a "cross-section of the community" to function as a source of common sense judgement of laymen. 399 U.S. at 100. In *Ballew*, the Court held that a five person jury was too small to fulfill this purpose. 435 U.S. at 245; see also *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972) (to come to common sense judgement, jury must consist of cross-sectional representation of laymen of community). In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Court applied the concept of cross-sectionality to a state statute which operated to exclude women from venires. *Id.* at 530. The Court stated that "if [women] are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied." *Id.* at 531.

<sup>45</sup> See *McCray*, 750 F.2d at 1128.

<sup>46</sup> *Id.* at 1128-29.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1130. Because the sixth amendment guarantees the right to an impartial jury in all criminal cases, the defendant need not meet the heavy burden of proof of systematic exclusion required under the equal protection analysis of *Swain*. See U.S. CONST. amend. VI; *McCray*, 750 F.2d at 1130.

dent, not only fails to solve the problem of racial use of challenges, but creates new problems that will plague the courts in their efforts to create impartial juries.

It is suggested that the basic flaw in *McCray* is the requirement that the prosecutor give a reason for challenges questioned by the defendant. Whenever a reason must be given, the challenge becomes less than peremptory.<sup>49</sup> Its value as an effective tool in the jury selection process is nullified because its use is limited by the discretion of the trial judge.<sup>50</sup> Similarly, because the sufficiency of the reason given by the prosecutor depends upon the judgment of the trial judge, the possibility exists that in some courts any "reason" proffered by the prosecutor will suffice, while in others none will do.<sup>51</sup> Thus, the *McCray* court's solution could in some cases mean nothing at all, while in others it could amount to a total destruction of the peremptory challenge.<sup>52</sup>

Various proposals to rectify the recognized abuses inherent in

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<sup>49</sup> *Swain v. Alabama*, 380 U.S. 202, 220 (1965); see also *United States v. Pearson*, 448 F.2d 1207, 1216 (5th Cir. 1971) (questioning of counsel's thought processes inconsistent with peremptory challenge system); *King v. County of Nassau*, 581 F. Supp. 493, 496 (E.D.N.Y. 1984) (difficult to preserve peremptory challenge and still require reason for its use); J. VAN DYKE, *supra* note 3, at 146 ("peremptories are truly arbitrary and can be made purely on the attorney's intuition"); cf. Note, *People v. Payne and the Prosecution's Peremptory Challenges: Will They be Preempted?* 32 DE PAUL L. REV. 399, 422-23 (1983) (judicial inquiry will inhibit voir dire).

If it can be said that the requirement of a reason destroys the effective utility of the peremptory challenge, then it follows that the *McCray* court's extension of the right to inquiry to only the defense leaves the defense with a strong opportunity to create a jury likely to acquit. Cf. Note, *Peremptory Challenge — Divining Rod for a Sympathetic Jury?*, 21 CATH. LAW. 56, 57 (1975) (prosecutors complain that defense counsel use sophisticated techniques to determine which prospective jurors will favor their cause, and which will not) [hereinafter cited as *Divining Rod*].

Both *Wheeler* and *Soares*, state court precedents for the result reached in *McCray*, extended the right of inquiry to the prosecutor. See *People v. Wheeler*, 22 Cal. 3d 258, 277, 583 P.2d 748, 762, 148 Cal. Rptr. 890, 903 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 488, 387 N.E.2d 499, 516, *cert. denied*, 444 U.S. 881 (1979); see also *State v. Neil*, 457 So. 2d 481, 486-87 (Fla. 1984) (right to object to improper use of challenges given both parties).

<sup>50</sup> See *McCray*, 750 F.2d at 1132; *infra* note 51.

<sup>51</sup> See, e.g., *King v. County of Nassau*, 581 F. Supp. 493, 495-96 (E.D.N.Y. 1984) (trial court accepted argument that challenged minorities sat apart from others, and were uncommunicative on voir dire, leading counsel to believe that they would be unable to deliberate effectively). The mere intuitive perceptions of counsel normally trigger the peremptory challenge. J. VAN DYKE, *supra* note 3, at 146. Thus, even when challenges are not used on the basis of group affiliation, counsel may not be able to articulate a reason for their use, or worse, he may feel the need to fabricate. See *McCray*, 750 F.2d at 1140 (Meskill, J., dissenting). Short of such a result, it is submitted, genuine reasons offered by counsel may not meet the subjective criteria of the individual trial judge.

<sup>52</sup> See *supra* note 51.

the present peremptory challenge system have been suggested by courts and commentators.<sup>53</sup> These proposals include: eliminating the peremptory challenge,<sup>54</sup> eliminating the prosecutor's challenges while leaving those of the defense intact,<sup>55</sup> reducing the number of prosecutorial peremptory challenges relative to those of the defense,<sup>56</sup> and reducing the number of challenges allotted to both sides.<sup>57</sup>

It is submitted that outright elimination of the peremptory challenge is not the answer. The challenge has long been recognized as an important tool of the trial lawyer.<sup>58</sup> The reasons for its endurance are strong—the inability of the challenge for cause to eliminate nondemonstrable, latent biases,<sup>59</sup> and the potential that

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<sup>53</sup> See *infra* notes 54-57.

<sup>54</sup> Cf. *King v. County of Nassau*, 581 F. Supp. 493, 502 (E.D.N.Y. 1984) (possible to imagine acceptable judicial system in which no peremptory challenges allowed). See generally, J. VAN DYKE, *supra* note 3, at 167-68 (elimination of peremptory challenges may be appropriate, yet good reasons exist for retaining challenge); Comment, *Curbing Prosecutorial Abuse of Peremptory Challenges — The Available Alternatives*, 3 W. NEW ENG. L. REV. 223, 245-46 (1980) (although peremptory system may need to be abolished due to abuses, this is unlikely to happen).

<sup>55</sup> See, e.g., J. VAN DYKE, *supra* note 3, at 167; Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 234-35 (1978). The prosecutor's job is not to secure convictions, but to see that justice is done. *McCray v. Abrams*, 750 F.2d 1113, 1131 (2d Cir. 1984). Thus, the prosecutor has a duty to secure an impartial jury, not one that is prone to convict. J. VAN DYKE, *supra* note 3, at 167.

<sup>56</sup> See J. VAN DYKE, *supra* note 3, at 169; Saltzburg & Powers, *supra* note 3, at 377. It has been suggested that more than half of all prospective jurors do not believe that a defendant is innocent until proven guilty. Saltzburg & Powers, *supra* note 3, at 377. Reduction of the number of prosecutorial challenges might help to offset this inherent advantage held by the prosecutor. *Id.*

<sup>57</sup> See J. VAN DYKE, *supra* note 3, at 169; Saltzburg & Powers, *supra* note 3, at 367-77. Reducing the number of challenges allotted to both sides will allow the parties to retain the benefits of the challenge, while denying either side the ability to change the cross-sectional character of the jury to a great degree. J. VAN DYKE, *supra* note 3, at 169. Additionally, if a party wastes challenges excusing jurors on the basis of dubious generalizations, he runs the risk of excusing jurors partial to his cause, and reduces his ability to remove unfriendly jurors. Saltzburg & Powers, *supra* note 3, at 365. As the number of challenges decreases, this "opportunity cost" rises. *Id.* at 376.

<sup>58</sup> *Swain v. Alabama*, 380 U.S. 202, 212-17 (1965). The *Swain* court noted the ability of the peremptory challenge system to withstand criticism through the history of English and American law. *Id.* The Court attributed this endurance to the "persistent . . . view that a proper jury trial required peremptories . . ." *Id.* at 213.

<sup>59</sup> See *id.* at 219-20. During voir dire, counsel may, for reasons that would not support a challenge for cause, come to feel that particular jurors will not be able to judge the case impartially. See Note, *supra* note 5, at 1718. The peremptory challenge allows counsel to excuse jurors suspected of harboring nondemonstrable biases, some of which may not be apparent to the jurors themselves. Saltzburg & Powers, *supra* note 3, at 354; see also Note,

questioning veniremen during voir dire will be less probative because counsel may fear offending potential jurors.<sup>60</sup>

It is submitted that the second proposal—eliminating only the prosecutor's challenges—is also an inadequate solution. Although the state has no constitutional right to an impartial jury,<sup>61</sup> if the defendant is allowed to create a jury biased in his favor, the adversarial system will not function properly.<sup>62</sup>

The last two proposals, which involve a reduction of the number of challenges, seem to present good opportunities to minimize abuse of the peremptory challenge.<sup>63</sup> Nevertheless, it is submitted that neither option directly addresses the core of the problem—the fact that the prosecutor's advantage over a minority defendant flows from the proportional underrepresentation of the minority group on the venire.<sup>64</sup>

#### A UNIFORM PROPORTIONAL PEREMPTORY CHALLENGE SYSTEM

It is suggested that a uniform act be drafted to give the defendant a share of challenges equal to the total number of available challenges minus that percentage which his minority group comprises in the community from which the venire is drawn. For example, if a defendant belongs to a minority group constituting one

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*supra* note 5, at 1720 (peremptory challenge means of eliminating unconsciously biased jurors).

<sup>60</sup> See *Swain*, 380 U.S. at 220. Questions asked by counsel during voir dire may often offend jurors and thus create hostilities when none had previously existed. *Id.* The peremptory challenge permits counsel to question jurors thoroughly without risking the possibility of having to try his case before a juror he has antagonized. *Id.* at 219-20. Thus, the peremptory challenge helps ensure an uninhibited voir dire, and therefore promotes the attainment of overall impartiality. See *id.*; Note, *supra* note 49, at 422-23.

<sup>61</sup> See U.S. CONST. amend. VI. Only the defendant is guaranteed an impartial jury by the sixth amendment. See *id.* However, the state has a strong interest in trying the accused before an unbiased jury. See Note, *supra* note 5, at 1719.

<sup>62</sup> See Note, *Divining Rod*, *supra* note 49, at 58 & n.16.

<sup>63</sup> See *supra* notes 56-57 and accompanying text. If the number of prosecutorial challenges is reduced, the ability of the prosecutor to eliminate an entire group from the petit jury decreases. See J. VAN DYKE, *supra* note 3, at 169. Had the prosecutor in *McCray*'s second trial been limited to less than eight peremptory challenges, it is possible that *McCray* would not have been tried by an all-white jury. See *McCray*, 750 F.2d at 1115. Some commentators argue that the defendant's challenges should be limited in the same way because defendants may be equally prone to use the challenges for unacceptable reasons. *E.g.*, Note, *Divining Rod*, *supra* note 49, at 73. Historically, however, the peremptory challenge has been a tool designed primarily for use by the defendant. See J. VAN DYKE, *supra* note 3, at 147. If the number of challenges for both sides is reduced, it is argued that the defendant should still have a greater number than the prosecutor. *Id.* at 169.

<sup>64</sup> See *supra* note 29 and accompanying text.

quarter of the population of the community, he would be entitled to three quarters of the total number of challenges; the prosecutor would receive the remaining one quarter.<sup>65</sup> The chance that a prosecutor could systematically eliminate members of the defendant's group from the petit jury would be dramatically reduced; in fact, his opportunity to exclude them would be balanced by the defendant's opportunity to challenge members of the majority.<sup>66</sup>

A modified *McCray* inquiry could be implemented by the defendant if his group is not recognized under the proposed act, or if a prosecutor successfully challenges all minority veniremen despite such an act.<sup>67</sup> The defendant could raise the same prima facie case as in *McCray*, but the prosecutor, it is suggested, could be allowed to rebut the inference of unconstitutionality with a showing of an absence of systematic exclusion of veniremen on the basis of group

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<sup>65</sup> At first glance, a proposal dividing the number of challenges between defendant and prosecutor based on a quota system may appear to conflict with the Supreme Court's prohibition of racial quotas in the affirmative action context. See *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 279 (1978). In *Bakke*, the Court asserted that classifications that favor the members of one racial or ethnic group over another are inherently suspect. *Id.* at 291. The Court held that, absent prior legislative, administrative or judicial findings of past or present discrimination against the group being favored by the classification, such classifications violate the Equal Protection Clause of the fourteenth amendment. *Id.* at 291, 307-09. However, in *Bakke*, the Court faced a selection system that used racial criteria to help minorities "at the expense of other innocent individuals." *Id.* at 307. It is submitted that, unlike traditional quotas, the proposed peremptory challenge system does not give rise to reverse discrimination; non-minority defendants are not burdened by the system because (1) their pre-existing challenge rights are not reduced, (2) they do not normally need the protection provided minorities under the proposed system because they do not face the same danger of prosecutorial abuse of peremptory challenges, and (3) they will have the benefit of the statute's protection when on trial in a community in which their own ethnic group is a minority.

<sup>66</sup> See *supra* note 29 and accompanying text. The ideal challenge system would give each party the same ability to excuse jurors thought to be partial to the other side. *Id.* However, it is clear that parties often use challenges on the basis of group affiliation. See *J. VAN DYKE*, *supra* note 3, at 155-60. Indeed, empirical studies have shown that this is more the norm than the exception. One study has shown that in all criminal trials conducted during a two year period in one federal court, 68.9 percent of the prosecutor's challenges were used against black jurors, despite the fact that blacks represented only one quarter of the venire. *Id.* at 155. In some of the cases often cited as following *Swain*, the defendants presented data tending to show that prosecutors were eliminating minorities from juries on a wide scale. See, e.g., *United States v. Newman*, 549 F.2d 240, 242-43 (2d Cir. 1977). In *Newman*, the Public Defender's Office conducted a statistical analysis of challenges in the relevant district, and found that the overall exclusion rate for minorities was 69.5%. *Id.* In *United States v. Carter*, 528 F.2d 844, 848 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976), the defendant presented statistical evidence that during one year in a particular federal district, the prosecution challenged 81% of the black veniremen peremptorily. *Id.*

<sup>67</sup> See *supra* note 66 and accompanying text.

affiliation over a period of time.<sup>68</sup> Although this showing resembles the defendant's prima facie case under the equal protection analysis of *Swain*,<sup>69</sup> it is suggested that, under a sixth amendment analysis, such evidence will be at least circumstantial evidence that the prosecutor has not systematically excluded minorities in a particular case. Moreover, it is submitted that unlike the subjective analysis of "reasons" proposed by *McCray*, analysis of statistical data would allow trial courts to rule on an objective basis.

### CONCLUSION

Although the practical effect of *McCray* is a marked departure from the rule of *Swain*, the conflict between the two decisions is more apparent than real. *Swain* protected the right of a cognizable group to participate in the judicial process.<sup>70</sup> *McCray* focused on the rights of the individual defendant to an impartial jury. Both cases rest upon sound applications of constitutional analyses.

It is submitted that the solution proposed by the Second Circuit in *McCray* does not fulfill its intended mission. Rather, the revision of peremptory challenge statutes to bring them in line with the purpose of the peremptory challenge system, together with a modified *McCray*-type inquiry in extreme cases, could protect both the defendant's sixth amendment right to an impartial jury and the integrity of the system.

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<sup>68</sup> See *Swain v. Alabama*, 380 U.S. 202, 240 (1965) (Goldberg, J., dissenting). In his dissent, Justice Goldberg argued that the burden should be placed on the state to refute involvement in discriminatory jury selection since the state "is a party to all criminal cases and has greater access to the evidence, if any, that would tend to negative such involvement." *Id.* (Goldberg, J., dissenting).

<sup>69</sup> *Id.* at 227 (1965).

<sup>70</sup> It is suggested that organizations representing allegedly excluded groups may have standing under *Swain* to mount equal protection attacks upon discriminatory prosecutorial peremptory challenges. The *McCray* court argued that despite the impossible standard of *Swain*, prosecutorial abuse of peremptory challenges on a wide scale may indeed be violating the equal protection rights of minority groups. *McCray*, 750 F.2d at 1121; cf. *Carter v. Jury Comm'n*, 396 U.S. 320, 321-22 (1970) (class action against state jury commission for alleged discriminatory jury selection practices).